

the Act as between canning employees and employees employed in other processing, marketing, and distributing of aquatic products on shore, to whom minimum wage protection, formerly provided only for canning employees, was extended by this action. The 1961 amendments, however, left employees employed in fishing, in fish farming, and in related occupations concerned with procurement of aquatic products from nature, under the existing exemption from minimum wages as well as overtime pay.

§ 784.103 Adoption of the exemption in the original 1938 Act.

Although in the course of consideration of the legislation in Congress before passage in 1938, provisions to exempt employment in fisheries and aquatic products activities took various forms, section 13(a)(5), as drafted by the conference committee and finally approved, followed the language of an amendment adopted during consideration of the bill by the House of Representatives on May 24, 1938, which was proposed by Congressman Bland of Virginia. He had earlier on the same day, offered an amendment which had as its objective the exemption of the "fishery industry," broadly defined. The amendment had been defeated (83 Cong. Rec. 7408), as had an amendment subsequently offered by Congressman Mott of Oregon (to a pending amendment proposed by Congressman Coffee of Nebraska) which would have provided an exemption for "industries engaged in producing, processing, distributing, or handling * * * fishery or seafood products which are seasonal or perishable" (83 Cong. Rec. 7421-7423). Against this background, when Congressman Bland offered his amendment which ultimately became section 13(a)(5) of the Act he took pains to explain: "This amendment is not the same. In the last amendment I was trying to define the fishery industry. I am now dealing with those persons who are exempt, and I call the attention of the Committee to the language with respect to the employment of persons in agriculture * * * I am only asking for the seafood and fishery industry that which has been done for agriculture." It was after this explanation that the

amendment was adopted (83 Cong. Rec. 7443). When the conference committee included in the final legislation this provision from the House bill, it omitted from the bill another House provision granting an hours exemption for employees "in any place of employment" where the employer was "engaged in the processing of or in canning fresh fish or fresh seafood" and the provision of the Senate bill providing an hours exemption for employees "employed in connection with" the canning or other packing of fish, etc. (see *Mitchell v. Stinson*, 217 F. 2d 210; *McComb v. Consolidated Fisheries*, 75 F. Supp. 798). The indication in this legislative history that the exemption in its final form was intended to depend upon the employment of the particular employee in the specified activities is in accord with the position of the Department of Labor and the weight of judicial authority.

§ 784.104 The 1949 amendments.

In deleting employees employed in canning aquatic products from the section 13(a)(5) exemption and providing them with an exemption in like language from the overtime provisions only in section 13(b)(4), the conferees on the Fair Labor Standards Amendments of 1949 did not indicate any intention to change in any way the category of employees who would be exempt as "employed in the canning of" the aquatic products. As the Supreme Court has pointed out in a number of decisions, "When Congress amended the Act in 1949 it provided that pre-1949 rulings and interpretations by the Administrator should remain in effect unless inconsistent with the statute as amended 63 Stat. 920" (*Mitchell v. Kentucky Finance Co.*, 359 U.S. 290). In connection with this exemption the conference report specifically indicates what operations are included in the canning process (see § 784.142). In a case decided before the 1961 amendments to the Act, this was held to "indicate that Congress intended that only those employees engaged in operations physically essential in the canning of fish, such as cutting the fish, placing it in cans, labelling and packing the cans for shipment are in the exempt category" (*Mitchell v. Stinson*, 217 F. 2d 210).

§ 784.105 The 1961 amendments.

(a) The statement of the Managers on the Part of the House in the conference report on the Fair Labor Standards Amendments of 1961 (H. Rept. No. 327, 87th Cong., first session, p. 16) refers to the fact that the changes made in sections 13(a)(5) and 13(b)(4) originated in the Senate amendment to the House bill and were not in the bill as passed by the House. In describing the Senate provision which was retained in the final legislation, the Managers stated that it "changes the exemption in the act for" the operations transferred to section 13(b)(4) from section 13(a)(5) "from a minimum wage and overtime exemption to an overtime only exemption." They further stated: "The present complete exemption is retained for employees employed in catching, propagating, taking, harvesting, cultivating, or farming fish and certain other marine products, or in the first processing, canning, or packing such marine products at sea as an incident to, or in conjunction with, such fishing operations, including the going to and returning from work and loading and unloading when performed by such an employee." In the report of the Senate committee on the provision included in the Senate bill (S. Rept. No. 145, 87th Cong., first session, p. 33), the committee stated: "The bill would modify the minimum wage and overtime exemption in section 13(a)(5) of the Act for employees engaged in fishing and in specified activities on aquatic products." In further explanation, the report states that the bill would amend this section "to remove from this exemption those so-called on-shore activities and leave the exemption applicable to 'offshore' activities connected with the procurement of the aquatic products, including first processing, canning, or packing at sea performed as an incident to fishing operations, as well as employment in loading and unloading such products for shipment when performed by any employee engaged in these procurement operations." It is further stated in the report that "persons who are employed in the activities removed from the section 13(a)(5) exemption will have minimum wage protection but will continue to be exempt from the Act's overtime

requirements under an amended section 13(b)(4). The bill will thus have the effect of placing fish processing and fish canning on the same basis under the Act. There is no logical reason for treating them differently and their inclusion within the Act's protection is desirable and consistent with its objectives."

(b) The language of the Managers on the Part of the House in the conference report and of the Senate committee in its report, as quoted above, is consistent with the position supported by the earlier legislative history and by the courts, that the exemption of an employee under these provisions of the Act depends on what he does. The Senate report speaks of the exemption "for employees engaged in fishing and in specified activities" and of the "activities now enumerated in this section." While this language confirms the legislative intent to continue to provide exemptions for employees employed in specified activities rather than to grant exemption on an industry, employer, or establishment basis (see *Mitchell v. Trade Winds, Inc.*, 289 F. 2d 278), the report also refers with apparent approval to certain prior judicial interpretations indicating that the list of activities set out in the exemption provisions is intended to be "a complete catalog of the activities involved in the fishery industry" and that an employee to be exempt, need not engage directly in the physical acts of catching, processing, canning, etc. of aquatic products which are included in the operation specifically named in the statute (*McComb v. Consolidated Fisheries Co.*, 174 F. 2d 74). It was stated that an interpretation of section 13(a)(5) and section 13(b)(4) which would include within their purview "any employee who participates in activities which are necessary to the conduct of the operations specifically described in the exemptions" is "consistent with the congressional purpose" of the 1961 amendments. (See Sen. Rep. No. 145, 87 Cong., first session, p. 33; Statement of Representative Roosevelt, 107 Cong. Rec. (daily ed.) p. 6716, as corrected May 4, 1961.) From this legislative history the intent is apparent that the application of these exemptions under the